82-1469

Office-Supreme Court, U.S.
FILED
MAR 4 1983
ALEXANDER L. STEVAS,

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ANNEMARIE PATTERSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Does a supervisor of migrant farm workers violate 8 U.S.C. §1324(a)(2) (1976) when she transports undocumented aliens to and from their homes, their places of employment, grocery stores or medical doctors, absent a direct or substantial relationship between that transportation and the aliens' entry or presence in the United States?

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ANNEMARIE PATTERSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Annemarie Patterson respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit entered on November 16, 1982.[1]

OPINIONS BELOW

No opinions or orders in the courts below were published. The opinion of the Court of Appeals for the Eleventh Circuit is reproduced as Appendix A. The Court of Appeals' order denying petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc is reproduced as Appendix B. The district court's judgment and probation/commitment order is reproduced as Appendix C.

[1] The names of all parties to the proceeding in the Eleventh Circuit are set forth in the caption of the case.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on November 16, 1982. The Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1976).

STATUTORY PROVISION INVOLVED

8 U.S.C. §1324(a) (1976) provides in relevant part:

> Any person . . . who—
>
> * * *
>
> (2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;
>
> * * *
>
> any alien . . . not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

STATEMENT OF THE CASE

Petitioner is a migrant farm worker who has supervised other migrant laborers at various locations in Georgia, Alabama and Florida for several years.[2] Her crews—which plant and harvest tobacco, sweet potatoes, onions, peppers, cabbage and other crops—are composed, in part, of Mexican immigrants. Some of those immigrants illegally entered the United States.

Petitioner was charged with transporting undocumented aliens in violation of 8 U.S.C. §1324(a)(2) (1976). At trial, there was sharply disputed evidence as to whether petitioner had participated in the transportation of those aliens from their points of entry into the United States to their original work locations in Florida or Georgia. *Compare* T. pp. 64, 96, 117, 133, 146, 160 *with* T. pp. 217-219, 222, 246.[3] The evidence was undisputed, however, that petitioner had knowingly transported undocumented aliens within Florida, Georgia and Alabama to and from the fields, their homes, grocery stores, laundries and doctors' offices. *See, e.g.*, T. pp. 28, 29, 38, 39, 54, 99, 100, 150, 151.

The district court excluded evidence offered by petitioner to show petitioner's relationship with the aliens she had transported on the grounds that such evidence was irrelevant to the issue of "whether or not somebody . . . transported an alien." T. p. 27. The evidence which was excluded would have disclosed the purpose and nature

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[2] In 1975, petitioner and her family moved from Tennessee to Florida, where they worked as fruit-pickers. They have lived in Ocilla, Georgia, for the last two years.

[3] Volume 1 of the Record on Appeal is referenced in this petition as "R. p. 1," etc.; volumes 2 and 3 of the Record contain the transcript of evidence and jury instructions and are referenced as "T. p. 1," etc.

of the transportation petitioner furnished. *See, e.g.*, T. 24-28, 41-42, 201-202.

Petitioner requested, but the district court refused to give, instructions which would have (1) permitted the jury to find petitioner guilty only if the transportation which petitioner furnished had a direct or substantial relationship to the furtherance of an undocumented alien's entry into or presence in the United States and (2) required the jury to find the petitioner not guilty if the transportation she furnished was only incidentally connected with the furtherance of an alien's illegal entry or presence. *See* Appendix E. Instead, the district court instructed the jury that it could convict petitioner if it found the transportation which she furnished was "done to assist [undocumented aliens] in remaining in this country illegally." *See* Appendix D at 9a. The district court gave several examples of "assistance," including interpretation of the English language and help in obtaining food, employment or housing. *Id.* The district court also instructed the jury that petitioner's motive for providing assistance to an alien was irrelevant. *Id.* at 10a. Thus, the district court's instructions authorized the jury to find a violation of §1324(a)(2) if petitioner furnished an undocumented alien with *any* transportation within the United States no matter how tenuously connected to the alien's entry or presence or how unselfishly motivated.[4]

On these instructions, the jury convicted petitioner of violating 8 U.S.C. §1324(a)(2) (1976). The district court

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[4] If, therefore, the jury believed the testimony that petitioner did not transport the aliens from their points of entry to Georgia and Florida, the jury would still, on the trial court's instructions, have been required to find petitioner guilty solely because of her subsequent localized transportation of the aliens in Florida, Georgia and Alabama.

entered judgment pursuant to the jury's verdict and sentenced petitioner to two years incarceration. *See* Appendix C.

On appeal, petitioner asserted, *inter alia*, that the district court had (1) incorrectly instructed the jury that the illegal transportation of aliens need not have a direct or substantial relationship with the aliens' entry or presence in this country and (2) improperly limited petitioner's examination of various witnesses. The Court of Appeals rejected petitioner's contentions and affirmed her conviction.[5]

REASONS FOR GRANTING THE WRIT

A. The Eleventh Circuit's Decision Deviates from Congressional Intent and Involves an Important Question of Federal Statutory Construction Which Has Not Been, But Should Be, Settled by This Court.

The expansive construction [6] of 8 U.S.C. §1324(a)(2) by both the district court and the Eleventh Circuit is in direct contradiction to Congress's intent in enacting that statute. Indeed, the legislative history to §1324(a)(2) makes it abundantly clear that Congress intended in §1324(a)(2) to prohibit only a narrow range of activities directly associated with the *entry* of undocumented aliens into this country.

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[5] The Eleventh Circuit also stated that petitioner's trial counsel failed to object timely to the trial court's refusal to give the requested instructions. *See* Appendix A at 2a. The Eleventh Circuit plainly erred on this point. *See* Appendix D at 11a; T. 253-257, 283-284; *Henderson v. United States*, 425 F.2d 134 (5th Cir. 1970); *Roberts v. United States*, 284 F.2d 209 (D.C. Cir. 1960), *cert. denied*, 368 U.S. 863 (1961).

[6] Criminal statutes such as 8 U.S.C. §1324(a)(2) (1976) are, of course, to be narrowly construed. *McBoyle v. United States*, 283 U.S. 25 (1931); *United States v. Fruit Growers Express Co.*, 279 U.S. 363 (1929).

The predecessor to §1324 was enacted in 1907. It prohibited only bringing in, or attempting to bring in, unauthorized aliens. *See United States v. Evans*, 333 U.S. 483, 485 (1948). That statute, in effect, "penalized only offenses related to smuggling [of aliens]." C. Gordon and H. Rosenfield, 2 *Immigration Law and Procedure*, 9-52 (1982) (hereinafter cited as Gordon and Rosenfield).

The Immigration Act of 1917 (ch. 29, 39 Stat. 874) made it illegal to harbor or conceal undocumented aliens. Gordon and Rosenfield at 9-53. Congress, nevertheless, continued to focus on "the smuggling of aliens and the harboring of smuggled aliens" and did not outlaw the *open* transportation of undocumented aliens to and from job sites, their homes and grocery stores. Committee on the Judiciary of the Senate, the Immigration and Naturalization Systems of the United States, S. Rep. No. 1515, 81st Cong., 2d Sess. (1950), *reprinted in* 0. Trelles and J. Bailey, 1 *Immigration and Nationality Acts: Legislative Histories and Related Documents* 644 (1979).

The transportation of undocumented aliens was made illegal in 1952 when §1324(a)(2) was enacted. The 1952 amendment was primarily intended to fill in technical gaps in the 1917 Act with respect to the concealment and harboring of illegal aliens. *See* H.R. Rep. No. 1365, 82d Cong., 2d Sess., *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1724. The "transportation clause" was, therefore, intended only to strengthen anti-smuggling prohibitions, not to broaden the overall coverage of the statute. *See id.*

Congress's intent to restrict the application of §1324 (a)(2) to the smuggling of aliens is further demonstrated in the legislative history of the "forfeiture" provision

which was added as §1324(b) in 1978.[7] An earlier version of the forfeiture amendment provided:

> Any vessel, vehicle, or aircraft which has been or is being used *in furtherance of a violation of subsection (a)*, or which has been or is being used by any person who for a fee refers or transports an alien for employment in furtherance of a violation of [another proposed subsection], shall be seized and forfeited. . . .

H.R. Rep. No. 108, 93d Cong., 1st Sess. 2 (1973) (emphasis added). The House report explained the forfeiture amendment as follows:

> Section 2 of this bill directs the forfeiture of vessels, vehicles, and aircraft which are *used in smuggling aliens* into the United States or which are used by individuals to refer or transport for a fee illegal aliens in furtherance of a violation of [another proposed subsection.]

Id. at 13 (emphasis added). Obviously, the House report equated "in furtherance of a violation of subsection (a)" with "used in smuggling aliens into the United States." Consequently, when the forfeiture amendment was finally enacted in 1978,[8] Congress could only have intended to permit the seizure of vehicles used in smuggling aliens into the country and did not intend to require forfeiture of vehicles used to transport aliens *within* the United States. *See* S. Rep. No. 1276, 95th Cong., 2d Sess. 3 (1978) ("Granting authority to seize vehicles used to smuggle

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[7] The forfeiture provision, 8 U.S.C. §1324(b) (Supp. V 1982), provides that any "conveyance . . . used in the commission of a violation of subsection (a) of this section shall be subject to seizure and forfeiture. . . ." Three vehicles were seized from petitioner.

[8] The forfeiture provision as enacted in 1978 *did not* contain the language in the 1973 proposed amendment which would have required forfeiture of vehicles used in the transportation of "an alien for employment."

aliens into the country will allow Border Patrol Agents to remove many vehicles from the smuggling trade.")

We submit, therefore, that Congress, when it passed §1324(a)(2), did not intend to outlaw the transportation of undocumented aliens where, as here, such transportation was not directly associated with the aliens' entry into the United States and that this Court should settle this important question of statutory construction.

B. The Lower Courts Have Used §1324(a)(2) Indirectly to Prohibit the Employment of Undocumented Aliens in Contravention of Congressional Intent and the Plain Wording of the Statute.

The scope of §1324(a)(2) should also be settled by this Court because the lower courts have used that provision, in effect, to outlaw the employment of undocumented aliens—conduct which, indisputably, has never been prohibited by Congress under the immigration laws.[9]

In its denial of petitioner's requested instructions, the district court explicitly stated that the employment of aliens necessarily furthered their presence in this country

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[9] *See, e.g.*, H.R. Rep. No. 108, 93d Cong., 1st Sess. 6 (1973) ("[U]nder present law there is no prohibition on the employment of illegal aliens . . . ."); President's Message Proposing Actions to Reduce the Flow of Undocumented Aliens in this Country and to Regulate the Presence of Those Already Here, H. Doc. No. 202, 95th Cong., 1st Sess. (August 4, 1977) (proposing legislation which would have made unlawful the hiring by any employer of an undocumented alien). Sanctions against employers of undocumented aliens are under consideration by Congress but have to date never been enacted. *E.g.*, The Knowing Employment of Illegal Immigrants, Hearing Before the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 97th Cong., 1st Sess. (1981) [hereinafter cited as Subcommittee Hearing]. Farm labor contractors are prohibited by 7 U.S.C. §2045 (1976) from, among other things, employing undocumented aliens. Petitioner, however, was not indicted under 7 U.S.C. §2045, and that statute is not involved in this case.

and that it intended to instruct the jury that the employment of undocumented aliens was, therefore, illegal:[10]

> It seems to me that [§1324(a)] prohibits the entry of aliens except under authorized circumstances and if anything done is in furtherance of their remaining in this country in that illegal status, then that is within the contemplation of what Congress prohibits.
>
> Now the only way you can stay in this country illegally is to have a place to live and have some means of subsisting. So to furnish jobs to those who are in this country illegally, knowing them to be here illegally, would have to be in furtherance of their remaining here illegally, in the court's best judgment. In essence, that is what I intend to advise the jury in this case . . . .

T. p. 256-257. The district court's view—which was set forth in the instructions to the jury, Appendix D at 9a, and which was affirmed by the Eleventh Circuit—is totally at odds with the plain wording of §1324(a) as well as the legislative history of that statute. *See* Gordon and Rosenfield 9-56 (Supp. 1982) ("While the 'mere employment' exemption applicable to harboring does not apply to the 'transporting' phase of the statute, it does not follow that the statute is violated by an employer transporting an alien employee who is improperly in the United States"). *See also, e.g.*, Hearings on H.R. 982 before the Subcommittee on Immigration, Citizenship, and International Law of the House Committee on the Judiciary,

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[10] The district court instructed the jury that "assistance" to an undocumented alien included providing that alien with a job. Appendix D at 9a. Thus, the district court's instruction effectively prohibited the employment of undocumented aliens by making any transportation of such aliens, incidental to their employment, illegal.

94th Cong., 1st Sess. 24 (1975) ("H.R. 982 [which was not enacted] makes it illegal to knowingly hire an illegal alien. Without such a law, no penalty reaches an employer for employing persons who, by law, cannot work in the United States." (Statement by Rep. Hamilton Fish, Jr.)).

We submit that the lower courts in this case have contravened the plain intent of Congress and construed §1324(a)(2) in a manner which will effectively prohibit the employment of undocumented aliens. Only this Court can fully restore the balance between legal and illegal conduct which Congress has struck.

C. Because of the Large Number of Undocumented Alien Workers in the United States, This Case Presents a Question of Major Importance Under the Immigration Laws Which Should Be Resolved by This Court.

There is an acute, practical need for a uniform resolution of the proper interpretation and scope of §1324(a)(2).

There are from 3 to 6 million undocumented aliens in this country.[11] In 1980 alone, Immigration and Naturalization Service ("INS") investigators arrested over 143,000 illegal aliens in the interior of this country; 46% of those aliens were employed at the time of their arrest.[12] Thus, if the Eleventh Circuit's construction of §1324(a)(2) is correct, hundreds of violations of §1324(a)(2) must occur daily. This is not a theoretical matter. INS records

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[11] Subcommittee Hearing, *supra* note 9, at 7 (prepared statement of Doris Meissner, Acting Commissioner, Immigration and Naturalization Service, U.S. Department of Justice, quoting the statement of the Attorney General before the Subcommittee on July 30, 1981).

[12] *Id.* at 8.

show 21,199 "violations encountered" under §1324(a)(2) in 1982.[13]

In light of these figures, the practical effect of the expansive instructions given by the district court that *any* transportation of an undocumented alien constitutes a violation of §1324(a)(2) is monumental. As another court has warned, the Eleventh Circuit's broad interpretation of §1324(a)(2) creates "a new crime and a new class of criminals" which "would potentially have tragic consequences for many American citizens who come into daily contact with undocumented aliens and who, with no evil or criminal intent, intermingle with them socially or otherwise." *United States v. Moreno*, 561 F.2d 1321, 1323 (9th Cir. 1977). Thus, the Eleventh Circuit has, in the words of the *Moreno* court, created "a new crime and a new class of criminals." *Id. See also* Gordon and Rosenfield 9-56 (Supp. 1982). Only this Court can resolve the important issue of whether the Eleventh Circuit's criminalization of this conduct was proper.

D. The Eleventh Circuit's Construction of 8 U.S.C. §1324(a)(2) is in Conflict with a Decision of the Ninth Circuit Court of Appeals.

The Eleventh Circuit's decision affirming the district court's jury instructions directly conflicts with the Ninth Circuit's decision in *United States v. Moreno*, 561 F.2d 1321 (9th Cir. 1977). Specifically, the Eleventh Circuit held that the district court properly (1) refused to charge the jury, as requested by petitioner, on the law as stated in *Moreno*, *see* Appendix A at 2a, and (2) excluded

[13] Telephone interviews with Jerry White, Statistical Analysis Branch, Immigration and Naturalization Service, Department of Justice (Feb., 1983). In contrast, only 2,927 "encountered violations" under §1324(a)(2) were documented in 1972. *Id.*

evidence offered to show the relationship between petitioner and the aliens and petitioner's purpose in transporting the aliens—considerations that were deemed relevant in *Moreno*. *See* Appendix A at 2a.

In *Moreno*, the Ninth Circuit held that §1324(a)(2) prohibited the transportation of aliens *only* when the transportation was "in furtherance of such violation of law," *i.e.*, the alien's illegal entry into this country. 561 F.2d at 1322. *Moreno* also held that the transportation, in order to be in furtherance of the violation of the immigration laws, must bear "a direct or substantial relationship" to "the alien's presence in the United States." *Id.* at 1323. The Ninth Circuit decided that because the defendant's transportation of aliens "was only incidentally connected to the furtherance of the violation of law" the defendant's conviction had to be reversed. *Id.* at 1322.

The Eleventh Circuit's decision in this case rejects *Moreno*'s limitations on the scope of §1324(a)(2) and thus establishes a different and broader standard for a federal felony in Georgia, Alabama and Florida than for the same offense in the Ninth Circuit. Given the potential reach and the extensive enforcement of §1324(a)(2) by INS, this conflict should not be allowed to persist and should be resolved by this Court.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Dated: March 4, 1983

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-8348

Non-Argument Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ANNEMARIE PATTERSON,
Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Georgia

(November 16, 1982)

Before TJOFLAT, JOHNSON and HATCHETT, Circuit Judges.

A True Copy
Attested:
Clerk, U.S. Court of Appeals, Eleventh Circuit

By: /s/ PAM HOLLOWAY
Deputy Clerk

Atlanta, Ga.

PER CURIAM:

Appellant was convicted on six counts of transporting illegal aliens in violation of 8 U.S.C. § 1324(a)(2). In this appeal, appellant contends that the evidence was insufficient to support her convictions and that we should direct the district court to enter a judgment of acquittal for her on each count. Alternatively, she contends that the court committed numerous prejudicial errors during the trial and that she is entitled to a new trial. We affirm.

Appellant presents several reasons why the prosecution's case against her was insufficient, but none have merit. The evidence that appellant knowingly and willfully transported the aliens within the United States in violation of section 1324(a)(2) was overwhelming. Appellant contends that the trial judge improperly limited her examination of various witnesses. We find no error; the judge acted well within the discretion accorded him by the Federal Rules of Evidence. Finally, appellant urges various errors in the judge's instructions to the jury. We have examined these instructions and conclude that they correctly stated the law. We also note that after the court instructed the jury and asked appellant's counsel if he had "any additions or corrections" to the court's charge, counsel answered in the negative, except to complain, without elucidation, that the court had failed to instruct the jury in accordance with the principles of the *Moreno* case (*United States v. Moreno*, 561 F.2d 1321 (9th Cir. 1977)). Record, vol. 2, at 283-84. Counsel's response fell short of what Fed.R.Crim.P. 30 requires a party to do to preserve jury instruction errors for appellate review. In any event, no plain error, much less error, appears in the jury charge.

AFFIRMED.

APPENDIX B

(U.S. Court of Appeals, Filed January 4, 1983,
Norman E. Zoller, Clerk)

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 82-8348

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ANNEMARIE PATTERSON,
Defendant-Appellant.

**Appeal from the United States District Court
For the Middle District of Georgia**

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 16, 11 Cir., 1982, ____ F.2d ____).
(January 4, 1983)

Before TJOFLAT, JOHNSON and HATCHETT, Circuit Judges

PER CURIAM

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ GERALD BARD TJOFLAT
United States Circuit Judge

REHG-6

United States District Court for

United States of America vs.

DEFENDANT: ANNEMARIE PATTERSON, D-1

THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

DOCKET NO. CR-82-1-VAL

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: June DAY: 3, YEAR: 1982

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Bob Reinhardt, P. O. Drawer 1287, Tifton, Ga. 31794 (Employed)
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY as to the nine count indictment,

FINDING & JUDGMENT

There being a ~~hearing~~/verdict of
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY, as to Counts 1, 2, 4, 6, 8 and 9,

Defendant has been convicted as charged of the offense(s) of unauthorized transportation of illegal aliens, in violation of 8 USC 1324.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

The maximum term of imprisonment prescribed by law, namely, FIVE (5) YEARS on each of Counts 1, 2, 4, 6, 8 and 9, or until she is otherwise discharged as provided by law, PROVIDED FURTHER, that defendant shall serve SIX (6) MONTHS on each count, consecutively, until service totals TWO (2) YEARS confinement, then thereafter, concurrently. The Execution of the Remainder of Sentence is hereby Suspended and the defendant is placed on probation for a period of FIVE (5) YEARS to follow the confinement portion of this sentence,

For a total confinement of TWO (2) YEARS, and a total probation period of FIVE (5) YEARS to follow the confinement.

SPECIAL CONDITIONS OF PROBATION

Filed at 11:46 AM
June 7, 1982
Curtis B. Cason
Deputy Clerk

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deli... a certified copy of this judgm... and commitment to the U.S. M... shal or other qualified officer, ...with copies for servi... upon defendant and his counse...

SIGNED BY

[X] U.S. District Judge
[ ] U.S. Magistrate

WILBUR D. OWENS, JR.

Date June 7, 1982

Charge
APPENDIX D

* * *

Now, let's look at the indictment. The charges are all alike except the names. The first charge says that during the months of June, July, August and September, 1981, in the Valdosta Division of the Middle District of Georgia and within the jurisdiction of this court, ANNE-MARIE PATTERSON, knowing that Daniel Cisneros-Cabello was then in the United States in violation of law and having reasonable grounds to believe that his entry, his last entry into the United States occurred less than three years prior to June, 1981, did transport, move, and attempt to transport and move within the United States by means of transportation and otherwise in furtherance of such violation of law, that same named person, an alien, not duly admitted by an immigration officer and then not entitled to enter or reside within the United States under the laws that are enumerated. And you will notice that it says 8 U.S.C. Section 1324; all the laws that are passed by Congress are published in chapters and each one is numbered. Eight is where we find all the laws about immigration and we look at number 1324, then we find this particular law. In Chapter 8 there is a scheme set up by Congress to determine who may be lawfully admitted into this country, if they are not already a citizen of this country. You all may have noticed in the news accounts about twice a year we hold a ceremony in this courtroom and admit new citizens. Of course, those are people who have applied for citizenship and have demonstrated that they fit the qualifications set up by Congress composed of our senators and our congressmen, the requirement to become a citizen. Now of course those laws also prohibit the entry of people who are not citizens ex-

cept under certain circumstances. We are not here about those circumstances. You have heard testimony from everyone of these people in question, that is, those who are alleged to come over to this country, across the Rio Grande, that they came into this country illegally without getting a permit from any Immigration Officer, without doing anything to comply with our laws. So we really don't need to go into those requirements for that purpose. That is simply background as to how it is we are here.

Congress not only has set up those requirements, it has gone further and set up certain acts which constitute crimes against the United States if they are committed. In this particular case it is based upon one of those laws and this is what that law says: Any person, and we are talking about anybody, none of us are exempt is what it is saying—any person. It describes among those including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation. It is a sweeping inclusion by Congress of any person. It would not exempt any of us. And it goes on to say who knowing that a person is in the United States in violation of the law, and knowing or having reasonable grounds to believe that person's last entry into the United States occurred less than three years prior thereto, transports or moves, or attempts to transport or move within the United States by means of transportation or otherwise, in furtherance of such violation of law is guilty of a crime against the United States.

Now let's tear that apart and look at it to see what you must find beyond a reasonable doubt to find this defendant guilty. Of course the first term that we talked about was any person—and it is obvious that term would include this defendant. Certainly it says knowing that an

alien is in the United States in violation of law. The first thing that the evidence has got to show is that this defendant knew as to each of these charges, that each one of these people, looked at separately, was in the United States illegally in violation of the law. She must have known that. And secondly, it says, and knowing or having reasonable ground to believe that the last entry of that illegaly person into the United States occurred less than three years ago. She's got to know that the person is illegally in this country, and secondly, she's also got to know or have reasonable ground to believe one or the other, not both. You either got to know it personally or have reasonable grounds to believe it, from all the circumstances to believe that this person last entered the United States less than three years ago. If they have been here longer than three years since their last entry, then it's no violation of the law. You've got to find those things beyond a reasonable doubt. It further says transports or moves or attempts to transport or move, so that means that the evidence has got to show that the defendant personally transported or moved these people, that is in a means other than transportation—moving—or attempted to transport or move within the United States. This is not talking about bringing them over—we are talking about now they are here—and this is transporting them within the United States. Now under the concept of aiding and abetting, she could also wilfully cause someone else to transport or move and that requirement would be satisfied. She could aid, abet, counsel, command, induce or procure the commission, the transportation. She doesn't have to personally drive the vehicle, is what I am saying, under the law. But it must be within the United States and it says by means of transportation or otherwise. Of course, to transport is simply to move some from one

place to another by any means of transportation. I guess literally we could get a big wheelbarrow and move an alien from one place to another and that would come within the law. But by any means of transportation – you use your common sense to interupt that. And it goes on to say 'in furtherance of such violation of law'. In other words we are speaking of more than just transporting somebody that we know to be in this country illegally. We are talking about in furtherance of a violation of law. What law? The law that we are speaking of here is the law that prohibits the person from being in this country illegally. The transportation has got to further their remaining in this country illegally. It has got to be for the purpose of their remaining here. It has got to be done to assist them in remaining in this country illegally. Now how do you assist somebody who is in this country illegally in remaining here illegally. Well to remain in this country illegally, what does any person have to do to avoid being known by the authorities as an illegal person. Well, if they don't speak English they first of all have got to have somebody to assist them in understanding English. We can assist them under this concept of the law by interpreting for them. Since they are human beings they have obviously got to eat to sustain life. They can be assisted by obtaining food. And you got to pay for the food, so they can be assisted by being furnished with a job. They have got to have a roof over their head in normal circumstances. They can be assisted by having a roof over their heads. So what we are talking about here is transporting in furtherance of the person remaining in this country illegally. Was that the purpose of the transportation? Now we are not looking at it from the standpoint of whether or not the defendant profited monetarily or did not profit monetarily from doing it. That is not an

element of this crime. It doesn't say that he who transports for profit is guilty of a crime. A person who wants to be charitable and who believes that he or she ought to look after aliens could violate this law just as well as somebody who wants to make money off of doing it. The object, the motive as I told you, is immaterial. So we are not looking at how much money the defendant may or may not have made from this venture. We are looking at it from the standpoint of whether or not her conduct, the transporting that she did within the United States, was for the purpose of these people remaining in this country illegally.

* * *

Now let me tell you some of the terminology that is in this charge. It says during the months of June, July, August and September, 1981; does the government have to prove that this happened in June, it happened in July on any particular date? An indictment is nothing but a notice, ladies and gentlemen, of a charge. That is the reason they can generalize as to time. All the government is required to prove is that on some date reasonably related to the date shown here, that she transported this particular named illegal alien on one particular occasion. And that would satisfy the law. The government doesn't have to show that in June she transported, in July she transported, in August she transported, and in September she transported. We are talking about one act of transportation substantial in nature during this period of time, and that is just the way the criminal world functions.

* * *

JURY LEAVES COURTROOM 9:45 A.M.

THE COURT: All right, any additions or corrections for the government?

MR. WHITLEY: No sir.

THE COURT: Any for the defendant?

MR. REINHARDT: No sir, we have no suggestions. We think Your Honor covered the issues. We do have objections or exceptions which the court has already considered.

THE COURT: Yes sir, the *Moreno* case you are talking about?

* * *

APPENDIX E

(Filed at 5:20 P.M., April 19, 1982, Helen F. Newberry, Deputy Clerk, U.S. District Court, Middle District of Georgia)

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA VALDOSTA DIVISION

UNITED STATES OF AMERICA vs. ANNEMARIE PATTERSON	CRIMINAL NO. 82-1 VAL VIOLATION: 8 U.S.C. §1324

DEFENDANT'S REQUESTS TO CHARGE

NOW COMES the defendant and respectfully requests that the court charge the jury on the principals of law attached hereto.

/s/ Bob Reinhardt

REINHARDT, WHITLEY & ROGERS, P.C.

REQUEST TO CHARGE NO. 1

I CHARGE YOU that the mere transportation of a person known to be an undocumented alien is not sufficient to constitute a violation of the statute. The transportation itself must be in furtherance of the illegal entry or the illegal presence of the alien in the United States. There must be a direct or substantial relationship between the transportation and its furtherance of the alien's presence in the United States.

United States of America vs. Moreno, 561 F.2d 1321 (1977).

REQUEST TO CHARGE NO. 2

I CHARGE YOU that to convict under the statute, the government must prove that (1) the accused transported or caused to be transported an alien within the United States, (2) the alien had not been lawfully admitted or was not lawfully entitled to enter, (3) this was known to the accused, (4) the accused knew the alien's last entry was within three years, and (5) the accused acted willfully in furtherance of the alien's violation of the law.

The requirement that the transportation must be in furtherance of the alien's violation of the law is a specific qualification on the type of transportation activity Congress meant to prohibit.

If you find from the evidence that the accused did transport any of the aliens named in the indictment but further find that such transportation was done as a part of the ordinary and required course of her employment or business activities and only incidentally connected with the furtherance of the alien's illegal entry or presence in the United States, the accused would not under those circumstances be guilty and you should acquit her.

United States of America vs. Gonzales, 534 F.2d 1353 (1976)
United States of America vs. Moreno, 561 F.2d 1321 (1977)

* * *

Office-Supreme Court, U.S.
FILED
MAY 6 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1466

In the Supreme Court of the United States

OCTOBER TERM, 1982

ANNEMARIE PATTERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's transportation of illegal aliens in the United States violated 8 U.S.C. 1324(a)(2).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1982. See 693 F.2d 134. A petition for rehearing was denied on January 4, 1983 (Pet. App. 3a-4a). See 696 F.2d 1007. The petition for a writ of certiorari was filed on March 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

8 U.S.C. 1324(a) is reproduced in pertinent part at Pet. 2.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia petitioner was convicted on six counts of transporting illegal aliens, in violation of 8 U.S.C. 1324(a)(2). She was sentenced to a five-year term of imprisonment on each of the six counts. The sentence was suspended except for four consecutive six-month terms of imprisonment, to be followed by a five-year period of probation. The court of appeals affirmed (Pet. App. 1a-2a).

The evidence at trial established that petitioner worked as a labor contractor for several farmers in Georgia, Florida and Alabama (Tr. 10-12, 32-35, 44-47). Six illegal aliens who worked for petitioner testified at trial.[1] Each had entered the United States illegally during the period from January 1980 through June 1981 (Tr. 58-60, 94-95, 115-116, 129-130, 144-145, 158). The initial work contact in the United States for each of the aliens was with petitioner, who arranged for payment of their transportation costs from the Mexican border to locations in either Florida or Georgia (Tr. 63-67, 96-98, 116-118, 130-134, 145-147, 158-161, 236).[2] Petitioner arranged for the aliens to work at various farms in Georgia, Florida and Alabama and provided for their housing at the work locations (Tr. 11-14, 33-37, 46-49, 72-74, 97, 101-102, 120, 239). Finally, petitioner provided the illegal aliens with transportation in her vehicles to work sites in those three states (Tr. 70-72, 98-104, 119-120, 134-139, 149-153, 162-165, 222-223).

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[1]Transportation of these six aliens formed the basis for the six counts on which petitioner was convicted.

[2]Petitioner recouped the cost of transportation of each alien from the border to Florida or Georgia by means of deductions from the alien's weekly pay (Tr. 67-68, 147, 160).

The court of appeals rejected all of petitioner's challenges to her conviction (Pet. App. 1a-2a). It concluded that the evidence that she knowingly and willfully transported aliens in violation of the statute was "overwhelming" (*id.* at 2a). The court of appeals also concluded that the trial court did not improperly limit petitioner's examination of witnesses and that the instructions to the jury were proper (*ibid.*).[3]

ARGUMENT

1. Petitioner first contends (Pet. 5-8) that Congress did not intend to prohibit transportation of illegal aliens that is not directly associated with the entry of such aliens into the United States. That contention lacks merit.

The statute under which petitioner was convicted, 8 U.S.C. 1324(a)(2), condemns any transportation of an illegal alien if the defendant knows that the alien's last entry into the United States occurred less than three years before. Under petitioner's construction of the statute, transportation of an illegal alien two and a half years after his entry into the country would fall outside the scope of the statute, since it would not be an activity "directly associated with the entry of undocumented aliens into this country" (Pet. 5). This construction on its face is at odds with the statute. Moreover, it is well established that 8 U.S.C. 1324(a) extends well beyond the chain of the smuggling process.[4] See *United States* v. *Rubio-Gonzalez*, 674 F.2d 1067, 1071,

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[3]The court of appeals also noted that petitioner's counsel failed to object to the jury instructions with the degree of specificity required by Fed. R. Crim. P. 30 (Pet. App. 2a).

[4]Petitioner cites the fact that in enacting the forfeiture provisions of 8 U.S.C. (Supp. V) 1324 Congress focused primarily on seizure of vehicles used in smuggling aliens across the border (Pet. 6-8). However, Congress' justifiable desire to remove such vehicles from the smuggling trade cannot be said to have repealed by implication the clear criminal prohibition on transporting illegal aliens within the United States.

1073 (5th Cir. 1982); *United States* v. *Cantu*, 557 F.2d 1173, 1180 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978); *United States* v. *Lopez*, 521 F.2d 437, 441 (2d Cir.), cert. denied, 423 U.S. 995 (1975); *United States* v. *Acosta de Evans*, 531 F.2d 428, 430 & n.4 (9th Cir.), cert. denied, 429 U.S. 836 (1976).

2. Petitioner also contends (Pet. 8-10) that the decision below is tantamount to a criminal prohibition on the mere employment of undocumented aliens. That contention is incorrect. Contrary to petitioner's suggestion (Pet. 8-9), the district court did not instruct the jury that the mere employment of undocumented aliens was illegal. Rather, it stated accurately (Pet. App. 9a) that the act of furnishing a job to an alien is one example of an action that could be "in furtherance of" the alien's continued illegal presence in the United States, as part of an effort to explain the meaning of the statutory phrase, "transports * * * in furtherance of such violation of law."[3] The court made it clear (*ibid.*) that the jury was to focus on whether there was "transporting in furtherance of" the alien's remaining in the United States illegally. The court's brief reference to employment for purposes of explaining a term used in the statute does not lead to the conclusion that the decision below effectively prohibits the employment of undocumented aliens.

3. Petitioner contends further (Pet. 10-11) that review is warranted because of the possible impact of the decision below on numerous individuals who give transportation to the millions of illegal aliens in the United States. But contrary to petitioner's suggestion (Pet. 11), the district court's

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[3]Petitioner partially quotes (Pet. 9) the district court's comments concerning this aspect of the instructions. However, petitioner omits the latter part of the court's statement, which makes clear that it was discussing whether employment of an illegal alien could be said to be "in furtherance of" his continued presence in the United States, not whether such employment itself is illegal.

instructions do not state that "*any* transportation of an undocumented alien constitutes a violation" of the statute. The district court instructed the jury concerning all the elements of the offense, including knowledge that the alien entered the country illegally and knowledge that such entry had occurred within the previous three years. More importantly, the district court instructed that the transportation must be "in furtherance of" the illegal aliens' continued presence in the United States (Pet. App. 7a-10a).

Petitioner's real quarrel is with the court's instruction concerning the meaning of transportation "in furtherance of" an alien's continued presence in the United States. Petitioner characterizes her activities as merely akin to employment and, in her view, outside the intended reach of the statute. However, 8 U.S.C. 1324(a) provides that employment of an illegal alien (including usual and normal practices incident to employment) is not deemed to constitute "harboring";[6] there is no such exception in the case of persons transporting illegal aliens to places where they may find work. See *United States* v. *Moreno*, 561 F.2d 1321, 1322 (9th Cir. 1977); *United States* v. *Gonzalez-Hernandez*, 534 F.2d 1353, 1354 (9th Cir. 1976). See also *United States* v. *Rubio-Gonzalez*, *supra*, 674 F.2d at 1073-1074 n.5; *United States* v. *Tamayo*, 427 F.2d 1072, 1074 (9th Cir. 1970). Furthermore, even if petitioner had been charged with harboring, her conduct also included provision of shelter and other services and was otherwise so egregious that the employment exception would not apply. See *United States* v. *Herrera*, 584 F.2d 1137, 1144-1145 (2d Cir. 1978); *United States* v. *Lopez*, *supra*, 521 F.2d at 441-442. For example, petitioner paid the transportation costs of the

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[6]The scope of the employment exception under 8 U.S.C. 1324(a) is well established. See *United States* v. *Herrera*, 584 F.2d 1137, 1144-1145 (2d Cir. 1978); *United States* v. *Cantu*, *supra*, 557 F.2d at 1177-1178; *United States* v. *Lopez*, *supra*, 521 F.2d at 440.

illegal aliens from the Mexican border to her location; in one case she spoke by telephone with a worker in Mexico and assured him work if he entered the country (Tr. 116); she transported illegal aliens to work sites throughout a tri-state area; and she arranged for housing for the illegal aliens at various work sites. See page 2, *supra*. On these facts, petitioner can hardly contend that her conviction will set a precedent capable of ensnaring "many American citizens who come into daily contact with undocumented aliens and who, with no evil or criminal intent, intermingle with them socially or otherwise." *United States* v. *Moreno*, *supra*, 561 F.2d at 1323.

4. Petitioner contends finally (Pet. 11-12) that the decision below conflicts with the decision of the Ninth Circuit in *United States* v. *Moreno*, *supra*. No such conflict exists, since *Moreno* is clearly distinguishable on its facts.

In *Moreno* the defendant was a foreman for a reforestation company. While driving a number of workers to a job site he was stopped by immigration officials who arrested several of the workers who were illegal aliens. The evidence indicated that Moreno was aware of the immigration status of the aliens. Moreno was convicted of violating 8 U.S.C. 1324(a), but the Ninth Circuit reversed, holding that his "mere transportation" of the illegal aliens was not shown to be sufficiently in furtherance of their violation of law. In so ruling the court noted that Moreno had been required to transport the aliens as part of his work for the reforestation company and that his superiors in the company had not been charged with any violation. 561 F.2d at 1322 & n.4.

As the *Moreno* court recognized, there are various types of transportation of illegal aliens, ranging from the clearly appropriate to the clearly criminal. Thus, the court believed, based on humanitarian considerations, that the transportation of an illegal alien to a hospital following an injury or an

accident would not be prohibited by the statute. 561 F.2d at 1322 n.3. The court in *Moreno* expressly stated that it was not holding that any transportation of an illegal alien in connection with employment was beyond the purview of the statute. *Id.* at 1323. The court held only that transportation of illegal aliens by someone who is required to do so as part of his employment is not clearly criminal in nature. In contrast, petitioner's actions were clearly criminal; perhaps only direct involvement with actual smuggling would come closer to the heart of the statutory prohibition. Petitioner paid for the transportation of the illegal aliens from the Mexican border to her location; she arranged work for them and arranged for their housing at the work sites; she herself engaged in much of the transportation of the aliens; and, finally, she ran her own labor contracting business and thus, unlike *Moreno*, was not in the position of a paid employee required to transport illegal aliens. There is no doubt that such conduct falls within the prohibition of the statute. See *United States* v. *Bazan*, 637 F.2d 363 (5th Cir.), cert. denied, 451 U.S. 993 (1981); *United States* v. *Herrera*, *supra*, 584 F.2d at 1145; *United States* v. *Lopez*, *supra*, 581 F.2d at 441; *United States* v. *Savard*, 493 F.2d 490 (5th Cir.), cert. denied, 419 U.S. 896 (1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1983

DOJ-1983-05

Office-Supreme Court, U.S.
FILED
MAY 16 1983
STEVAS,
CLERK

NO. 82-1466

IN THE

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ANNEMARIE PATTERSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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NO. 82-1466

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The Eleventh Circuit's decision in this case extends the reach of 8 U.S.C. §1324(a)(2) (1976) to criminalize conduct to an extent far beyond that which is prohibited by the plain wording of the statute, contravenes congressional intent and conflicts with a decision of the Ninth Circuit. The arguments raised in the brief in opposition in no way detract from these important reasons for granting certiorari.

I. PETITIONER WAS CHARGED ONLY WITH THE UNAUTHORIZED TRANSPORTATION OF UNDOCUMENTED ALIENS AND ALLEGATIONS WITH RESPECT TO OTHER HYPOTHETICAL VIOLATIONS OF THE IMMIGRATION LAWS ARE IRRELEVANT.

Petitioner was charged only with "the offense of un-

authorized transportation of illegal aliens in violation of 8 U.S.C. §1324." Pet. at 5a. It is thus irrelevant for the Government to contend that petitioner's conduct also included "provision of shelter and other services and was otherwise . . . egregious. . . ." Opp. Brief at 5. Similarly, the Government's argument that petitioner also violated the "harboring" prohibitions in §1324(a)(3) has no bearing on the issues presented to this Court. Harboring is a separate, distinct offense. *See United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1073 n.5 (5th Cir. 1982). More importantly, the particular question of statutory construction raised by petitioner—*i.e.*, the limitation imposed by the "in furtherance of" language found in §1324(a)(2)—is simply inapplicable to "harboring" because there is no comparable language in §1324(a)(3).

II. TRANSPORTATION OF UNDOCUMENTED ALIENS IS LEGAL UNLESS IT BEARS A DIRECT AND SUBSTANTIAL RELATIONSHIP TO THEIR ILLEGAL ENTRY INTO THIS COUNTRY.

Section 1324(a)(2) prohibits the transportation of unauthorized aliens only when the transportation is "in furtherance of such violation of law." The plain language of the statute and its legislative history both demonstrate that the "in furtherance" clause confines the prohibitions of 8 U.S.C. §1324(a)(2) to transportation that had a direct or substantial relationship with the alien's entry or presence in the United States.[1] *See* Pet. at 5-8. The Government, however, simply reads the "in furtherance" clause out of the statute. Opp. Brief at 3.

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[1] The government also argues that petitioner's construction of 8 U.S.C. §1324(a)(2) must be incorrect because it would mean that "transportation of an illegal alien two and a half years after his entry into the country would fall outside the scope of the statute. . ." Opp.

The cases cited by the Government for the proposition that "8 U.S.C. §1324(a) extends well beyond the chain of the smuggling process" are inapposite. Opp. Brief at 3. Each of the cases cited by the Government pertains only to *harboring* illegal aliens in violation of §1324(a)(3).[2]

III. THE ELEVENTH CIRCUIT'S DECISION CANNOT BE DISTINGUISHED FROM UNITED STATES V. MORENO.

In *United States v. Moreno*, 561 F.2d 1321 (9th Cir. 1977), the Ninth Circuit held that the transportation of an undocumented alien, in order to be "in furtherance" of the violation of the immigration laws, must bear "a direct or substantial relationship" to "the alien's presence in the United States." 561 F.2d at 1323. The Ninth Circuit decided that because the defendant's transportation of aliens "was only incidentally connected to the fur-

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Brief at 3. Petitioner's construction of §1324(a)(2) would mean no such thing. The instructions requested by petitioner (Pet. at 13a) would have permitted the jury to find that transportation of an undocumented alien anytime within three years of his entry into the country was illegal so long as the transportation had "a direct or substantial relationship" to "furtherance of the alien's presence in the United States." *See United States v. Moreno*, 561 F.2d 1321, 1323 (9th Cir. 1977).

[2] *See Rubio-Gonzalez*, 674 F.2d 1067; *United States v. Cantu*, 557 F.2d 1173 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978); *United States v. Lopez*, 521 F.2d 437 (2d Cir.), *cert. denied*, 423 U.S. 995 (1975); *United States v. Acosta De Evans*, 531 F.2d 428 (9th Cir.), *cert. denied*, 429 U.S. 836 (1976). To the extent that the cases cited by the Government have any relevance to the offense of transportation of illegal aliens, the cases actually reinforce petitioner's arguments. These cases stand for the propositon that "the term [harbor] was intended to encompass conduct tending *substantially* to facilitate an alien's 'remaining in the United States illegally.' " *United States v. Lopez*, 521 F.2d at 441 (emphasis supplied); *accord, Cantu*, 557 F.2d 1180; *Rubio-Gonzalez*, 674 F.2d at 1073. Compare petitioner's Request to Charge No. 1, Pet. at 13a.

therance of the violation of law," the defendant's conviction had to be reversed. *Id.* at 1322. In petitioner's case, the district court refused to give the jury instructions embodying the language used in *Moreno*. *See* Pet. at 13a, 14a. Since the Eleventh Circuit affirmed the district court's refusal to give these instructions, the decision in this case plainly conflicts with *Moreno*.

The government cannot distinguish this case from *Moreno* by recitation of evidence upon which the jury *could* have found petitioner guilty under a proper construction of Section 1324(a)(2). Opp. Brief 2-3, 5. The testimony cited by the government with regard to petitioner's alleged contacts with undocumented aliens at the time of their entry into this country was disputed at trial.[3] Because the trial court's instructions in effect told the jury that petitioner's contacts with the undocumented aliens *after* they arrived in Georgia were in and of themselves illegal, the jury was not permitted (i) to consider whether that conduct—the fact of which was undisputed at trial—was not "in furtherance" of the undocumented aliens' entry into this country (and therefore legal) and (ii) to believe petitioner's testimony—as opposed to the testimony of the aliens—that she did not have other contacts with the undocumented aliens directly and substantially related to their entry into this country. Thus, the government cannot legitimately contend that the erroneous instructions submitted to the jury were harmless error[4] or that important issues of statutory construction and a direct conflict between the circuits are not presented by this petition.

[3] *See* Opp. Brief at 2 and *compare* with T. pp. 217-219, 222, 246 (cited at p. 3 of Pet.).

[4] "[I]n jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury. . . ." *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919).

IV. THE ELEVENTH CIRCUIT'S DECISION IMPERMISSIBLY CRIMINALIZES EMPLOYMENT OF UNDOCUMENTED ALIENS.

The trial court implicitly instructed the jury that the transportation of undocumented aliens for employment purposes was automatically a violation of §1324(a)(2) when it stated that the act of furnishing a job to an undocumented alien was one example of an action that was in furtherance of that alien's continued illegal presence in the United States.[5] It is, of course, up to Congress to make such decisions. *See United States v. Evans*, 333 U.S. 483, 486 (1948) ("defining crimes and fixing penalties are legislative, not judicial functions"). The district court's instructions gave such a broad reading to Section 1324 (a)(2) that the effect of the Eleventh Circuit's affirmance of those instructions was to expand the scope of the statute in such a way as to "make a surprisingly broad range of unremarkable conduct a violation of federal law." *Williams v. United States*, 102 S.Ct. 3088, 3093 (1982) (reversing a Fifth Circuit decision which affirmed the Government's interpretation of 18 U.S.C. §1014 (1976)).

It is all the more clear that employment of undocumented aliens is not a violation of current immigration

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[5] The government further suggests that the employment related transportation of illegal aliens is within the intended reach of §1324(a) by notice that (i) §1324(a) provides that employment of an illegal alien (including usual and normal practices incident to employment) is not deemed to constitute harboring and (ii) there is no such exception in the case of persons transporting illegal aliens to places where they may find work. Opp. Brief at 5. However, "[w]hile the 'mere employment' exemption applicable to harboring does not apply to the 'transporting' phase of the statute, it does not follow that the statute is violated by an employer transporting an alien employee who is improperly in the United States." C. Gordon and H. Rosenfield, 2 *Immigration Law and Procedure*, 9-56 (Supp. 1982).

laws because there is legislation now pending the purpose of which is to make it illegal to employ undocumented aliens. This legislation—the Immigration Reform and Control Act of 1983—would, if enacted, make it unlawful for any employer knowingly to hire or recruit for a fee any alien not authorized to work in the United States. *See* H.R. 1510 & S. 529, 98th Cong., 1st Sess. (1983). In view of this pending legislation, it is obvious that (i) the current law does not prohibit the transportation of undocumented aliens for employment purposes where such transportation is unassociated with their entry into this country and (ii) the Eleventh Circuit misconstrued that law when it endorsed the trial court's statement to the jury that providing employment to undocumented aliens was an example of a violation of 8 U.S.C. §1324(a)(2).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 17, 1983